No. 07-21

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE AARP AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF PETITIONER [SEVERE BURDEN ON OLDER VOTERS]

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BRIEF AMICI CURIAE OF AARP IN SUPPORT OF PETITIONER [SEVERE BURDEN ON OLDER VOTERS]

STATEMENT OF INTEREST OF AMICI CURIAE

AARP is a nonprofit, nonpartisan organization dedicated to addressing the needs and interests of Americans aged 50 and older.[1] AARP is the largest

[1] Pursuant to this Court's Rule 37.6, *amici* note that no counsel for any party authored this brief in whole or in

membership organization representing the interests of older Americans, with more than thirty-nine million members—over 880,000 of whom live in Indiana. Older individuals vote in disproportionately high numbers, and AARP has long advocated for fair and simple procedures that facilitate this high level of participation. AARP supports fair and effective procedures to detect and prevent voter fraud. AARP does not support procedures that reflect partisan bias, or that permit arbitrary or discriminatory reviews or voter challenges that may discourage turnout by older voters.[2]

Based on these principles, AARP Foundation Litigation has served as co-counsel in cases in Georgia and Arizona challenging state photo identification voting requirements,[3] and AARP has also participated as *amicus curiae* in challenges to similar legislation in Missouri and Michigan.[4] These

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part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have filed consent letters with the Clerk regarding *amicus* briefs.

[2] Unless otherwise specified, "older voters" herein refers to all individuals over the age of 50 who are eligible to vote.

[3] *See Common Cause/Georgia* v. *Billups*, 501 F. Supp. 2d 1333 (N.D. Ga. 2007); *Gonzalez* v. *Arizona*, Nos. 06-1268-PHX, CV 06-1362-PHX, CV 06-1575-PHX, 2006 WL 3627297, slip op. (D. Ariz 2006).

[4] Brief of *Amicus Curiae* – Women's Voices Raised for Social Justice, AARP, *et al.*, 203 S.W. 3d 201 (Mo. 2006)

laws threaten to reduce legitimate citizen participation—particularly participation by older voters—in the electoral process.

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and wellbeing of low-income older persons in their country. For thirty-five years, NSCLC has served that population through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC has participated in numerous cases advocating on behalf of the rights of older persons. NSCLC recognizes the serious adverse impact of burdensome election rules on many older voters, especially older voters with limited incomes and/or disabilities, as well as older voters who are members of minority groups that historically have encountered difficulty preserving their voting rights.

SUMMARY OF ARGUMENT

Indiana's photo identification law[5] ("Indiana photo ID law" or "Indiana photo ID requirement") places a

(No. SC88039); Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law and AARP, *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 721 N.W.2d 799 (Mich. 2006) (No. 130589).

[5] *See* Senate Enrolled Act No. 483 (2003), Pub. Law. No. 103-2005, codified at Ind.Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-10-8-25; sections of Ind.Code ch. 3-11-8; sections of 3-11.7; and 9-24-16-10.

severe burden on older Americans' fundamental right to vote, and thus violates the First and Fourteenth Amendments of the United States Constitution unless it survives strict scrutiny. Because the court of appeals failed to evaluate properly this appreciable burden as required under *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992), the decision below should be reversed.

Voters who possess a driver's license, or other form of government-issued photo identification, suffer little or no inconvenience under the Indiana photo ID law. However, older voters, including older voters living in Indiana, are significantly less likely to have photo identification compared to members of other age groups. Contrary to what proponents of the Indiana Photo ID requirement suggest, absentee voting is not an adequate substitute for in-person voting, and as such any older voter who wishes to fully exercise the right to vote must first obtain the requisite identification. To obtain photo identification, older voters must overcome numerous financial and nonfinancial obstacles. The burdens created by these obstacles are severe, and are even more severe for Indiana's older voters who are also minorities, women, and/or individuals with disabilities.

The severe burdens resulting from the Indiana photo ID requirement will hinder the right of innumerable older Indiana voters to participate fully in the democratic process. The decision below should be reversed. The Indiana Photo ID requirement

should be subject to strict scrutiny, and the decision below should be reversed.

ARGUMENT

In upholding the Indiana photo ID requirement, the Seventh Circuit assumed that the law need only survive minimal scrutiny. *See Crawford* v. *Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Pet. App. 5–6.) Under *Burdick*, however, a court assessing a constitutional challenge to a state election law under the First and Fourteenth Amendments must determine the proper "rigorousness of . . . inquiry" – or level of scrutiny – based on the "extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *See* 504 U.S. at 434. A requirement that places "severe restrictions" on the right to vote must survive the most exacting scrutiny, and thus is unconstitutional unless the government shows that the restriction is narrowly drawn to meet a compelling state interest. *Id.* (quotation and citation omitted). Using strict scrutiny, the court must then weigh "'the character and magnitude'" of the burden on the plaintiffs' constitutional right to vote, against "'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983)).

In 2005 the Indiana legislature amended the Indiana Code to include a requirement that registered voters provide proof of identification in

order to vote at the polls. *See* Senate Enrolled Act 483 (2003), Pub. L. No. 103-2005. "Proof of identification" includes only unexpired Indiana or federal government-issued photo identification. *Id.* § 3-5-2-40.5. The identification must include the name of the individual, and the name on the identification must conform exactly to the name in the individual's voter registration record. *Id.* The most common forms of acceptable identification are Indiana drivers' licenses or identification cards, *see* (Pet. App. 31), although a U.S. Passport would also be adequate under the law. To obtain any acceptable form of identification, the individual will at some point be required to present a certified copy of his or her birth certificate.[6]

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[6] Indiana regulations require driver's-license and identification-card applicants without a current Indiana driver's license, permit, or identification card to present at least one primary document to the Bureau of Motor Vehicles. 140 Ind. Admin. Code § 7-4-2 (2006). The primary document applicable to most citizens is a certified birth certificate. *Id.* Other documents are only available to some classes of American citizens, such as those born abroad (certificate of naturalization/citizenship, certification of report of birth, U.S. consular report of birth, birth certificates issued by U.S. territories) and those who have ties to the military (U.S. military or merchant marine identification card with photo, U.S. veterans' universal access identification card with photo). An applicant for an Indiana driver's license or identification card may show an Indiana driver's license or learner's permit, or a U.S. Passport, but to have obtained these documents, a certified birth certificate must have been presented initially. *See id.*; U.S. Department of State, *Application for a U.S. Passport, Instruction Sheet*, page 2 of 4, *available at* http://www.state.gov/documents/organization/79955.pdf [hereinafter *Passport Application*].

The Indiana photo ID requirement disproportionately affects older voters because they are less likely to have the identification and other documents necessary for compliance. In addition, the burden on many of these older voters to obtain the required identification is severe, thus warranting strict scrutiny review.

I. INDIANA'S PHOTO IDENTIFICATION LAW DISPROPORTIONATELY AFFECTS OLDER VOTERS, AN EFFECT THAT IS NOT MITIGATED BY THE ABSENTEE VOTING EXCEPTION.

Older Americans consistently demonstrate a strong commitment to the electoral process by exercising their right to vote more frequently than other age groups. In the 2004 presidential election, citizens 55 and older reported voting at a rate of 71.8%, as compared with a rate of 63.8% among all Americans. U.S. Census Bureau, *Voting and Registration in the Election of November 2004: Population Characteristics* 4 (Mar. 2006), *available at* http://www.census.gov/prod/2006pubs/p20-556.pdf.

As the number of older Americans rises, and the life expectancy of the U.S. population increases, the influence of older voters on the electoral process has

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Indiana also requires driver's-license applicants to provide a Social Security number document, which includes a Social Security card or a letter or Numident report from the Social Security Administration. 140 Ind. Admin. Code § 7-4-2.

the potential to increase as well. This segment of the population is expected to grow rapidly during the coming years, as children born during the "baby boom" reach age 65 and beyond. *See* Administration on Aging, U.S. Department of Health and Human Services, *A Profile of Older Americans: 2006* (Last Updated July 12, 2007), http://www.aoa.gov/prof/Statistics/profile/2006/profiles2006.asp. By 2030, there will be 71.5 million potential older voters in the United States — nearly twice the number from 2005. *Id.* As a result, older voters likely will comprise a larger percentage of the electorate and play an increasingly important role in American electoral politics.

The Indiana Photo ID requirement disproportionately affects older voters because they are substantially less likely to have the required identification. Moreover, because absentee voting is not an adequate substitute for the right to participate in the political process in person, all older Indiana voters who wish to fully participate in the electoral process must obtain photo identification.

A. Indiana Has Placed an Unnecessary and Severe Burden on Older Voters' Fundamental Right To Vote.

Older voters are substantially less likely than other voters to have the identification required by the Indiana photo ID law, for a variety of reasons. When older voters apply for a new or renewal license, they face heightened scrutiny from state bureaus or departments of motor vehicles ("BMV"s or "DMV"s).

These voters are also often encouraged by family members (both subtly and less so), to relinquish their driver's licenses.

Although older drivers have fewer accidents than other age groups, a few high-profile accidents have led states to raise the standards for older drivers to obtain a driver's license. *See* Kelley Schoonover, *Senior Drivers' Numbers Swelling: States Face Decisions About How to Deal with Older Motorists as Boomers Age*, Orlando Sentinel, Oct. 28, 2006. Although Illinois and New Hampshire are the only states to require drivers over a specific age to pass a road test, a number of states provide for special requirements for older Americans to obtain a driver's license. *See* Insurance Institute for Highway Safety, *U.S. Driver Licensing Procedures for Older Drivers* (July 2007), http://www.iihs.org/laws/olderdrivers.aspx [hereinafter *Licensing Procedures*].

Seventeen states, including Indiana, provide that drivers over a certain age must renew their licenses more frequently than other drivers. *See id.*; Ind. Code § 9-24-12-1; 9-24-12-10. At least ten states require a special vision screening for older drivers, and some require presentation of a physician's note attesting to the individual's fitness for driving. *See Licensing Procedures, supra*. Seventeen states also require drivers over a certain age to appear in person at the DMV to renew their licenses. *Id.* Older drivers may be denied a license for inability to meet the unique thresholds dictated by these standards. Moreover, countless older drivers "self-regulate," giving up their driving privileges voluntarily rather

than subject themselves to the added scrutiny. *See* Ari Houser, AARP Public Policy Institute, *Fact Sheet: Older Drivers and Automobile Safety* 2 (Aug. 2005), *available at* http://assets.aarp.org/rgcenter/il/fs51r_drivers.pdf.

As a result, it is no surprise that, as the district court noted, *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 824 n73 (S.D. Ind. 2006) (Pet. App. 104 n73,) a "verifiable poll" indicates that a significant number of persons who identified themselves as registered Indiana voters aged 60 or older have neither a valid driver's license nor a state-issued identification card. Susan L Silberman, Indiana AARP, *Voter Identification in Indiana: A Demographic Analysis of Impact on Older Indiana Citizens* (October 2005) (J.A. at 30.) [hereinafter *Indiana AARP Voter Identification Survey*]. The Census Bureau estimates that, in 2006, Indiana's population included 780,992 residents over the age of 60. U.S. Census Bureau, *Fact Sheet: Indiana*, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US18&_state=04000US18. The Indiana AARP survey found that three percent of respondents had neither a valid driver's license nor a state-issued identification card, which can be extrapolated to estimate that more than twenty-three thousand potential Indiana voters over the age of 60 lack the requisite identification to vote under the Indiana photo ID requirement. Silberman, *Voter Identification in Indiana*, *supra*, at 32. The findings were even more pronounced for individuals who are 75 or older, with six percent of those registered

Indiana voters reporting that they were without the identification needed to vote. *Id.* at 32.

National surveys suggest that even larger numbers of America's older voters would be unable to vote if their respective states adopted a similar photo ID requirement. According to a 2006 survey, as many as 18% of Americans over age 65 do not have a driver's license or any other government-issued photo identification card. *See* Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 2, *available at* http://www.brennancenter.org/stack_detail.asp?key=97&subkey=39242&proj_key=76 (November 2006) [hereinafter *Citizens Without Proof*]; *see also* Robert Greenstein *et al.*, Center on Budget and Policy Priorities, *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* (Sept. 22, 2006), http://www.cbpp.org/9-22-06id.htm. This is substantially higher than the average percentage of American citizens who do not have such documents.[7] These facts suggest that laws like the Indiana Photo ID requirement would place a disproportionate and "particular burden on an identifiable segment" of American voters. *Anderson*, 460 U.S. at 792.

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[7] *See Citizens Without Proof*, *supra* (suggesting that seven percent of Americans nationwide do not have ready access to a government-issued ID).

B. That Indiana Citizens over Age 65 May Vote Absentee Does Not Ameliorate the Need for Older Indiana Voters to Obtain Government-Issued Identification to Fully Exercise Their Right to Vote.

The lower courts dismissed the above-described evidence that a significant number of older Indiana voters do not have photo identification as "tangential," *Rokita*, 458 F. Supp. 2d at 824 n73 (Pet. App. 104 n73,) and irrelevant because "anyone 65 or over can vote by absentee ballot." *Crawford*, 472 F.3d 949, 950 (7th Cir. 2007); *see* Ind. Code § 3-11-10-22(c) (stating that registered voters aged 65 or older may vote by absentee ballot). That argument, however, ignores numerous realities of voting by absentee ballot.

Even for those able to avail themselves of the absentee ballot, absentee voting is not a replacement for in-person voting. If anything, absentee balloting adds additional obstacles and layers of uncertainty to the voting process. Thus, older citizens—who are substantially less likely to have necessary identification—must obtain photo identification to fully exercise their right to vote.

First, the absentee system threatens older voters' right to have their votes counted. In *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), this Court recognized that a constitutionally protected right exists to have one's vote counted and counted equally—a proposition reaffirmed in recent election cycles. *See, e.g.*, *Bush* v. *Gore*, 531 U.S. 98, 104–05

(2000). As explained in *Sanders*: "Every voter's vote is entitled to be counted once. It must be correctly counted and reported.... '[T]he right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.'" 372 U.S. at 380 (quoting *United States* v. *Mosley*, 238 U.S. 383, 386 (1915)). In *Reynolds* v. *Sims*, 377 U.S. 533, 561–562 (1964), the Court went even further, recognizing this right to have one's vote counted fairly as "fundamental ... in a free and democratic society."

Recent accounts suggest that absentee balloting procedures fail to protect the right to have one's vote counted equally to the same extent as in-person voting procedures. In Marion County, Indiana, alone, newspapers report instances of the election board not counting absentee voters' votes. In 2004, for example, absentee ballots were never counted despite having been cast lawfully and in a timely manner, because the Election Board failed to deliver them to the polling place on time. *See* Editorial, *Go the Distance to Make Each Vote Count*, Indianapolis Star, Nov. 17, 2006. According to Marion County election officials, some absentee ballots are discarded each year because of this problem. *Id.* A lawful ballot that is discarded or ignored is not irrelevant; indeed, news accounts of the election that year confirm that a number of races were close, with one Marion County race being decided by seven votes. *See* Brendan O'Shaughnessy, *Democratic Incumbent Loses by 7*, Indianapolis Star, Nov. 18, 2006, at 1. The loss of one's vote due to an uncounted absentee ballot, therefore, is not a harmless error.

This is a recurring issue. Just two years later, in November of 2006, the Indianapolis Star reported that absentee ballots in Marion County were printed incorrectly, and many were not counted. James A. Gillaspy, *Ballot Error Leads to Call for Resignation*, Indianapolis Star, Oct. 18, 2006. Two candidates' names were left off the absentee ballots, and 250 defective ballots were mailed out to voters. *Id.* This was a disservice not only to the candidates whose names were left off the ballot, but also to the absentee voters who received incorrect ballots and who may not have had the opportunity to cast votes that counted.

Second, absentee voting is not an adequate substitute for in-person voting because voters receive substantially less notice of the procedures for voting in this manner. Because of the lack of clarity—especially where voters are unable to easily ask a question of poll workers as they could if they were voting in person—citizens are not on notice of their rights and responsibilities to the extent allowed when voting in person. In Indiana, absentee voters must deal with archaic and often confusing paper ballots, which create a higher risk of voter error. Recent news reports from Marion County indicate that many absentee voters find the absentee ballot instructions indecipherable and confusing. *See* Rich Van Wyk, WTHR, *Absentee Ballots Cause Confusion* (Updated Nov. 5, 2007), http://www.wthr.com/Global/story.asp?S=7228533. According to one Marion County voter, the cover letter to the ballot and the ballot itself gave conflicting directions. The directions were so

confusing that this registered voter feared he would "spoil[ ]" his ballot by doing the wrong thing. *Id.*

Despite such complaints, the Marion County Election Board has indicated it has no plans to change or clarify these documents to ease the burden on absentee voters, because "these are the instructions [they have] used for years." *Id.* (quoting Marion County Clerk Beth White). Absentee voters must therefore maneuver a confusing voting process with less notice than they would receive if they were allowed to vote in person on Election Day.

Third, voters who must vote absentee are stripped of an important right to have full information when casting their ballots. To ensure that ballots arrive at the local election board on time to be counted – assuming they are handled properly by the election board – voters must mail their ballots at least several days prior to Election Day. *See* Ind. Code § 3-11-10-14 (noting that if an absentee ballot arrives to a precinct after the specified final delivery time, it will not be counted). Absentee ballots, therefore, cannot include last-minute changes to the ballot, nor can an absentee voter's vote reflect consideration of a "late-developing issue" or allow for "new information disclosed about a candidate late in the race." *Burdick* v. *Takushi*, 504 U.S. at 445 (Kennedy, J., dissenting). As such, absentee voting by mail—the only alternative to the photo identification

requirement available to elderly voters—is not a replacement for in-person voting.[8]

II. REQUIREMENTS FOR OBTAINING GOVERNMENT-ISSUED PHOTO IDENTIICATION POSE OBSTACLES THAT CONSTITUTE SEVERE BURDENS ON OLDER VOTERS.

For many voters in Indiana, the process of voting is—as it should be—relatively painless and free. Aside from a modest amount of time spent at the polling location, the average voter pays nothing to exercise the fundamental right to vote.

For many older citizens who wish to exercise their right to vote, however, the story is very different. As shown above, older voters are more likely than other voters to lack the identification that Indiana requires to vote. Moreover, the prerequisites to obtain photo identification pose substantial obstacles for older persons. These obstacles include economic costs borne by all older voters, as well as particular economic and noneconomic costs that affect older voters who are also minorities, women, or disabled.

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[8] If a voter wants to cast an absentee ballot in person, the voter may do so up until noon on Election Day. Ind. Code § 3-11-10-26(d). While this might allow elderly voters to vote on the most current ballot and information, Indiana law requires individuals who cast absentee ballots in person at the clerk's office to present identification in the same manner as a voter who votes in person at the polls, which includes presenting photo identification. *Id.* at 3-11-10-26; 3-5-2-40.5.

Together, these obstacles constitute severe restrictions on the voting rights of older voters.

A. Financial Costs Associated with Obtaining Government-Issued Identification Are Significant for Many Older Voters.

In order to obtain an Indiana driver's license, or identification card, or a U.S. Passport, an applicant must pay one or more fees that he or she would otherwise not be required to remit in connection with voting. The fee for an Indiana driver's license is $19.50. *See* Indiana Bureau of Motor Vehicles, *Driver License Charges*, http://www.in.gov/bmv/fees/driverlicense.htm. While the fee is reduced for residents over the age of 75, the overall financial burden remains similar because older drivers are required by law to renew more frequently than other license holders. Ind. Code § 9-24-12-1; 9-24-12-10. The fees for a U.S. Passport are even more substantial: The basic fee for an adult is $97, and can rise substantially, depending on the speed with which it is required to be obtained. *Passport Application*, *supra* note 4; 22 C.F.R. § 22.1 (2007); *see also* Jane Engle, *Lengthy Delays in Getting New U.S. Passports*, L.A. Times, March 6, 2007 (reporting change in State Department policy requiring up to ten weeks—rather than the normal six week delay—to receive a passport after one applies, and up to three or four weeks or "'possibly longer'" for expedited service instead of the usual two

weeks) (citing Bureau of Consular Affairs, U.S. Department of State, *How Long Will It Take to Process a Passport Application?*, http://www.travel.state.gov/passport/get/processing/processing_1740.html).

Older voters who neither have nor wish to pay to obtain an Indiana driver's license may use a state-issued identification card to vote; however, an applicant for such a card must still pay fees to obtain required official documents, such as a birth certificate. Indiana poses a $10 fee on all Indiana-born citizens -- with no exceptions -- who need a certified birth certificate in order to obtain an identification card. *See* Ind. Code § 16-37-1-11; 16-37-1-11.5. Furthermore, Indiana cannot establish or waive the fees that its citizens who were born out of state may face they attempt to obtain an acceptable birth certificate for purposes of an identification card. Citizens born outside of Indiana, but within the United States, may be required to pay anywhere from $12 to as much as $20 simply to obtain a birth certificate. (Pet. App. at 8.) Naturalized citizens, who must obtain birth certificates from foreign entities may pay even higher fees. *See* Department of Homeland Security, U.S. Citizenship & Immigration Services, *Instructions for N-565, Application for Replacement Naturalization/Citizenship Document* 2 (Expires April 30, 2010), *available at* http://www.uscis.gov/files/form/N-565instr.pdf (providing notice that the fee for a naturalization certificate or a certificate of citizenship is $380).

In reality, the costs associated with a birth-certificate request frequently do not stop at the fee for the certificate itself. The numerous fees and obstacles to obtaining a birth certificate would constitute a severe burden, for example, for an "elderly person who lives in South Bend, but was born in Arkansas." *Crawford*, 472 F.3d at 955 (Evans, J., dissenting) (Pet. App. 13.) In the state of Arkansas, the fee for a birth certificate is $12. Arkansas Department of Health, *Birth Certificate Application*, *available at* http://www.healthyarkansas.com/certificates/vr7_birth_app.pdf. An applicant who must receive a birth certificate more quickly than the standard four- to six-week processing time (*e.g.*, to be able to secure an identification card in time to vote in an upcoming election), or who cannot print the Arkansas application at home, may make an express request by Internet or by phone through a service known as VitalCheck. *See* Arkansas Department of Health, Express Service for Records, http://www.healthyarkansas.com/certificates/certificates.html#. However, VitalCheck, as offered on the Arkansas Health Department Web site, entails an additional fee of $8.95. *See* VitalChek Express Certificate Service, http://www.vitalcheck.com (follow "Birth Certificate" hyperlink; select "Arkansas" and complete all fields; follow "Continue" hyperlink). If the applicant needs the birth certificate more quickly than the seven to ten days required for the general express service, he or she must pay an additional $21 fee for expedited delivery.[9] *Id.* The total fees for a

[9] The express service and expedited express service fees must be paid by credit card. *Id.* Thus, many older adults

single older voter, therefore, can exceed $40,[10] well in excess of what courts in Missouri and other jurisdictions have already concluded constitutes a "severe" restriction on the right to vote. *See, e.g.*, *Weinschenk* v. *Missouri*, 203 S.W. 3d 201, 216 (Mo.

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who lack a credit card must forgo this option and wait the month and a half required for mail delivery from the Arkansas Health Department.

[10] A number of other additional costs may add to this total. For instance, to obtain a birth certificate from in Georgia, an individual must pay fees in addition to the cost of the certificate, because the applicant must use either a certified check or money order—payment types for which banks and other institutions often charge a fee—or a credit card through VitalCheck—which imposes an $8.95 fee. Division of Public Health, Georgia Department of Human Resources, Vital Records: Birth Certificates, http://health.state.ga.us/programs/vitalrecords/birth.asp. A California-born voter must include a notarized affidavit attesting to his or her identity with a birth certificate request—a service for which Indiana notaries public may charge a fee. *See* Health and Human Services Agency, State of California, *Application for Certified Copy of Birth Record*, page 1 of 3, *available at* http://www.dhs.ca.gov/publications/forms/pdf/vs111.pdf.; *see also* Ind. Code § 33-42-8-1 (allowing notaries public to charge a fee for services).

Furthermore, because voters who attempt to obtain an identification card likely cannot drive, such voters may incur additional fees in connection with the transportation necessary to make the numerous trips associated with getting the proper documents and the identification card itself. *See* infra Part II, Section B, Subsection 2 (noting that at least four trips to the BMV would be necessary for one older Indiana voter to obtain documentation and identification).

2006) (finding that a $15 fee to obtain a Missouri birth certificate was, without more, a severe burden on certain Missouri voters).

For Indiana residents who were born in certain other states, obtaining a birth certificate may be next to impossible. An older voter born in Georgia, for example, must provide a copy of valid photo identification to obtain a birth certificate. Division of Public Health, Georgia Department of Human Resources, *Vital Records: Birth Certificates*, http://health.state.ga.us/programs/vitalrecords/birth.asp. Where an individual seeks to obtain a birth certificate in order to obtain a photo identification card, the convergence of Indiana's photo ID law with other states' proof-of-identity requirements for a birth certificate may completely sever the individual from their fundamental right to vote—a violation of the U.S. Constitution. *See Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) (reaffirming that Article I of the U.S. Constitution forbids outright denial of the right to vote).

The myriad costs to obtain government-issued photo identification are likely to hit older voters particularly hard. A significant percentage of older voters live on fixed incomes, often relying on Social Security payments to keep them out of poverty. *See* Center on Budget and Policy Priorities, *Social Security and Poverty Among the Elderly: State Fact Sheets, Indiana* (April 8, 1999), *available at* http://www.cbpp.org/4-8-99socsec-states1.htm#INDIANA. A study found that even with Social Security assistance, one in ten Indiana

residents aged 65 or older live in poverty, a figure confirmed by U.S. Census data. *Id.; see* Current Population Survey, Bureau of Labor Statistics & U.S. Census Bureau, *Annual Social and Economic Supplement, March Supplement* (Last Revised Aug. 29, 2006), *available at* http://pubdb3.census.gov/macro/032007/pov/new46_100125_06.htm. The Indiana AARP survey described in Part I confirmed these findings. Almost 12% of older voters who answered questions about their incomes had incomes below $10,000 in 2004, and almost one-third of respondents had incomes below $20,000 in 2004. *See Indiana AARP Voter Identification Survey, supra.* Fifteen percent of respondents with incomes below $20,000 reported that they lacked a driver's license or other acceptable form of identification. *See id.*

For older voters in low-income brackets, the fees associated with obtaining government-issued identification are anything but trivial. To suggest that those who are unable to pay the many fees associated with obtaining government-issued identification are "disfranchis[ing] themselves" ignores completely the realities of life for many older Americans. *See Crawford*, 472 F.3d at 952 (Pet. App. 5.) Although Indiana law provides that "indigent" individuals may have their vote counted even if they cannot show identification, Ind. Code 3-11.7-5-2.5, this exception will not relieve the burden for all older voters. Individuals who do not consider themselves to be "indigent" may nonetheless live on fixed incomes and may regularly be forced to "go to the bother" of deciding how to allocate a modest income. *See Crawford*, 472 F.3d at 952 (Pet. App. 5.) For those

older voters, the state-imposed obligation to allocate part of a fixed and limited income to fulfill numerous financial prerequisites necessary to obtain a state-issued photo identification is a severe burden on the fundamental right to vote.

B. The Burdens Placed on Older Minority, Women, and Disabled Voters Are Even More Severe.

Older citizens who are also female, disabled, and/or racial or ethnic minorities will face additional—and in some cases insurmountable—difficulties in obtaining a birth certificate. In some situations, such individuals could be completely precluded from voting because of these severe burdens.

1. Older Minority Voters May Not Have Been Issued a Birth Certificate, and Thus May Be Completely Barred from Voting Because They Cannot Obtain Necessary Identification.

Because of historical lack of access to health care for minorities—particularly African Americans—prior to the 1960s, many African-American voters in their 60s, 70s, and 80s are substantially more likely to have been born outside a hospital. *See* S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 Population Studies 86, 99 (1950) [hereinafter *Development of Birth Registration*] (citing Robert D. Grove, Bureau of the Census *Studies in the Completeness of Birth*

Registration, 17 Vital Statistics Special Reports (1943)). As a result, a substantial number of older minority voters likely had little or no access to formal health care or to an agency where a birth certificate would have been issued. *See* Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DePaul J. of Health Care L. 735 (2005) [hereinafter *Tragedy and Remedy*]. One study of births occurring in the United States between December 1939 and March 1940, for instance, found that nearly 23% of all births of nonwhite children occurring out of hospitals were unregistered. *Development of Birth Registration, supra* at 99. Such situation was "particularly serious" because three of four nonwhite infants were born at home. *Id.* Many minority citizens born outside hospitals would thus be significantly less likely to have a birth certificate on file with the state, making it especially burdensome to prove identity in the manner necessary to obtain a state identification card.

Indiana law permits eligible voters aged 65 and older to obtain an identification card without a birth certificate;[11] this exception is insufficient, however, to alleviate the burden on older voters who, while not

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[11] Under this exception, an individual must attest that they have never been issued a birth certificate, and must also present other forms of identification. Indiana Bureau of Motor Vehicles, *Driver License, Frequently Asked Questions*, http://www.state.in.us/bmv/driverlicense/drlicensefaq.htm #5.

yet 65, are unable to obtain a birth certificate.[12] Until the 1960s, substantial segregation persisted in parts of the American health care system, and many African-Americans were denied access to hospitals throughout the first half of the twentieth century. *See Tragedy and Remedy*, *supra*, at 748 (2005). Indiana's "solution," therefore, improperly ignores voters, born in the mid- to late-1940s and even the 1950s, who were not born in a hospital and will not be able to produce the birth certificate they need to obtain a driver's license or state identification card.

2. Women May Face Additional Financial and Logistical Barriers To Obtaining Documentation Necessary for an Identification Card.

For many women, the names listed on their birth certificates will differ from their current names. Under the Indiana photo ID law, the name on the government-issued identification card must exactly match the name on the voter registration rolls. Ind. Code § 3-5-2-40.5(1). If there is a discrepancy, the individual will be forced to obtain a new identification card, or be completely barred from having her vote counted.

Until the mid-1970s, some states actually denied a woman the right to vote if she did not assume the surname of her husband. *See, e.g.*, *Dunn* v. *Palermo*,

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[12] *See* Ind. Code § 3-5-2-16.5 (defining "elderly" as an individual who is at least 65).

522 S.W.2d 679 (Tenn. 1975) (striking down law that required married woman to vote under husband's surname); *Stuart* v. *Bd. of Supervisors of Elections*, 295 A.2d 223 (Md. 1972) (recognizing for the first time a Maryland woman's right to register to vote under her maiden name). A married woman's right to use her maiden name was not even recognized in Indiana until 1974. *In re Hauptly*, 312 N.E. 2d 857 (Ind. 1974). Moreover, in light of the traditional pressures on a woman to take her husband's name, which only started to wane in the 1970s, older women are more likely than younger women to use a married name. *See* Claudia Goldin & Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J. of Econ. Persp. 143, 143–44 (Spring 2004). Many older women voters who seek to obtain a state identification card, therefore, will be required to procure not only a birth certificate, but other official documentation as well, including marriage certificates and name-change documents to ensure that they are able to obtain an identification card that bears their name exactly as it appears on the voting rolls.

These additional requirements for older women mean this group of older voters will face additional economic and noneconomic hurdles to obtaining a birth certificate, on top of those shared by all older individuals. The record below provides the example of Theresa Clemente, an 80-year-old woman who attempted to obtain a state-issued identification card so that she could vote. (J.A. at 93.) On her first visit to the Indiana BMV, she was told she needed a birth certificate. *Id.* On her second visit, she was told that

the copy of her birth certificate was insufficient, because it was not certified. *Id.* Ms. Clemente requested a certified copy from Massachusetts, where she was born, which cost $28 and took two weeks to receive. *Id.*

But Ms. Clemente's birth certificate contained her maiden name, and the BMV officials completed the paperwork for her identification card using that name—not the name on her voter registration card. *Id.* Ms. Clemente noticed the mistake in the paperwork, but BMV officials informed her that she had to present a certified copy of her marriage certificate in order to receive a card that would include her current name, and fulfill the terms of the Indiana photo ID requirement. Securing a marriage certificate required payment of yet another fee – for $15 to the City of Boston, Massachusetts. City of Boston, *Marriage Certificate*, http://www.cityofboston.gov/registry/registermarriage.asp. Like Ms. Clemente, many older women will be forced to pay additional sums and to make multiple trips to the BMV, making the burden associated with the Indiana photo ID law even more severe for them than for all older voters.

3. Older Persons with Disabilities Will Be Particularly Ill Equipped To Handle the Severe Burdens Associated with Obtaining Identification.

In 2002, 72% of Americans aged 80 and older reported having disabilities, as compared to 18% of all Americans. U.S. Census Bureau, *Table 1, Prevalence of Disabilities by Age, Sex, Race, and Hispanic Origin: 2002*, *available at* http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t1.pdf. In Indiana, 78% of voters over the age of 85 reported having a disability, as compared to 16% of the general Indiana population. Center for Personal Assistance Services, University of California San Francisco, *Indiana Disability Table from the 2005 American Community Survey*, Estimates for 2005, http://www.pascenter.org/state_based_stats/state_statistics_2005.php?state=indiana#about (reporting disability rates of 9.8% for ages 18-44; 19% for ages 45-64; and 45% for ages 65 and older for persons in Indiana).

Disabled Indiana voters will face a number of additional burdens as a result of the Indiana photo ID law, in addition to dealing with those faced by all older voters. The consequences of disability include high health care needs that can diminish expendable income. U.S. Census Bureau, *65+ in the United States*: 2005, at 58, *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf [hereinafter *65+ in the U.S.*"] (noting that the cost of medical care for disabled older people is three times that for non-disabled people). Thus the financial burdens faced by all older voters who attempt to obtain necessary documentation for photo

identification cards will be even more severe for disabled voters.[13]

Furthermore, for many older disabled persons, the burdens associated with overcoming the access and mobility challenges that confront all voters who need photo identification to vote are likely to be nothing short of insuperable. Under federal law, a "disability" is variously defined. It may consist of a "physical or mental impairment that substantially limits" an individual's ability to perform "one or more ... major life activities," *see* Americans with Disabilities Act, 42 U.S.C. § 12102(2), where the individual is still "qualified" to work, with or without "reasonable accommodation." *See id.* at 12111(8). It may be even more severe, and cause an individual to be unable to perform "substantial gainful work which exists in the national economy." *See* Social Security Act, 42 U.S.C. 1382c(a)(3)(B). In either case, a "disability" might preclude such basic personal care tasks as bathing, eating, dressing, and even moving out of a bed or a chair. *65+ in the U.S* at 58. Such diverse impairments may be especially significant in limiting voters'—especially older voters'— access to procedures and facilities connected with obtaining a photo ID, perhaps even more so than the impairments limit a person's ability to work, participate in public programs, or visit nearby public accommodations. In the past, a disabled Indiana voter who made the choice to participate to the fullest in the electoral process was, at least prior to enactment of the photo ID law, required to make just

[13] *See supra* Part II, Section A.

one trip to the polls to vote for each election. This might involve a once-annual activity. Yet for many disabled individuals, Indiana's photo ID law requires as many as four trips just to secure the identification required to vote. This is unreasonable, and imposes an onerous burden on any such individual's right to vote.

CONCLUSION

The Indiana photo ID requirement places a severe burden on the fundamental constitutional rights of older voters, and the requirement should therefore be analyzed according to a strict scrutiny standard. For the foregoing reasons, as well as those contained in the petitioner's brief, *Amici curiae* AARP urges that the Seventh Circuit's decision be reversed.

Respectfully submitted,

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